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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 267

DENNIS MULKNE MOON

Petitioner

v.

STATE OF MARYLAND

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland (A. 15-16) entered on August 2, 1967, is reported in 1 Md. App. 569, 232 A. 2d 277 (1967). Petitioner was granted certiorari by the Court of Appeals of Maryland and its opinion (A. 18 to 31) dated July 3, 1968, is reported in 250 Md. 488, 244 A. 2d 564 (1968).

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioner's Brief.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Amendment Five to the Constitution of the United States of America

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis supplied)

2. Amendment Fourteen to the Constitution of the United States of America

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I

Should the decision of this Honorable Court in *North Carolina v. Pearce* and *Simpson v. Rice*, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072, decided June 23, 1969, be held to be retroactive?

II.

Are the decisions in *North Carolina v. Pearce*, *supra*, and *Simpson v. Rice*, *supra*, applicable to the instant case?

III.

Does the increase of sentence imposed upon the Petitioner at the conclusion of his second trial on the same offense for which he was formerly convicted constitute a violation of the double jeopardy provision of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

While no question is raised as to the Petitioner's guilt the Respondent believes a factual outline is essential to the issue of this case.

Prosecution in this case was for the robbery with a dangerous and deadly weapon and assault with intent to murder of a female hardware store clerk who was making a deposit of receipts. The victim, Patricia Hinkel, an employee of Poch Hardware located in the Congressional Shopping Center, Rockville, was walking to the American National Bank, located in the same shopping center, at about 11:30 A.M. on May 18, 1964, when Petitioner struck her about the head with a tape-covered pipe and stole the receipts amounting to more than $450. Petitioner was a former employee of Poch Hardware. He knew Mrs. Hinkel well and she knew him. He was familiar with the procedure for depositing receipts and had performed that service personally.

The beating inflicted on Mrs. Hinkel was so severe that she was unconscious for three days. According to medical testimony introduced at the Petitioner's second trial, the

SUMMARY OF THE ARGUMENT

The decisions of this Honourable Court in Pearce and Stevenson should not be held to be retrospective

a) Retroactivity generally whereas such would be the instance of the trial the very integrity of the fact finding process Linkletter v Walker Mishkin v New York Roberts v Russell Arsenault v Massachusetts etc Such factors not present in Pearce and Simpson

b) Non Retroactivity of Pearce Simpson supported by Linkletter v Walker Tehan v Shott Johnson v New Jersey Jenkins v Delaware Stovall v Denno Desist v United States Halliday v United States

c) Similarity of purpose between Pearce Simpson rule and rule in McCarthy v United States

d) Reliance of Maryland and other jurisdictions on old rule Desist v United States Hankin v State Mitchell v State

e) To apply rule retroactively would impose an unjustifiable burden on administration of justice Procedural problems that would arise the absence of witnesses dimming of memory etc

II

Assuming that the Rule enunciated in Pearce and Simpson is not retroactive the sentence of the Petitioner does not violate the Fourteenth Amendment

a) Due process requires vindictiveness play no part in actual sentence not fear of such vindictiveness in defendant exercising his right to appeal Pearce and Simpson

b) Presumption of vindictiveness not part of vindictiveness played part in petitioner's sentence it should be set aside

III

Increased sentence of the Petitioner does not constitute a violation of the Double Jeopardy Provision of the Fifth Amendment and Fourteenth Amendment

a. Double Jeopardy clause enforcement against the states *Benton v. Maryland*

b. Double Jeopardy clause requires credit for time served under first sentence *Pearce* and *Simpson*

c. The petitioner received credit for time served under his first sentence plus seven months for which he was incarcerated pending his first trial

d. That increased punishment at second trial is not violative of double jeopardy clause was answered clearly and emphatically by *Pearce* and *Simpson*

ARGUMENT

I.

[illegible] *NORTH CAROLINA v. PEARCE AND SIMPSON* [illegible]
[illegible]

At the end of the first term of this Honorable Court it was held in *North Carolina v. Pearce and Simpson* that whenever a judge imposes a more severe sentence upon a defendant after a new trial the reasons for his doing so must affirmatively appear. It was further stated that those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

The new procedural requirements announced applied to future cases. It was to be applied retroactively or prospectively. It was interpreted that it was a violation

of the due process clause of the Fourteenth Amendment of the Constitution of the United States to vindictively punish with more severe sentences those who successfully seek retrials, and that the only way fear of such vindictiveness can be said to be alleviated and the channels of appeal kept open was to require that judges state their reasons for the harsher sentence. The Respondent State of Maryland recognizes that the chilling effect of such apprehension is unconstitutional and that such retaliatory motives are reprehensible and indefensible. The purpose to be served by this new rule is entirely prophylactic in effect and therefore in consonance with prior decisions of this Court is particularly adaptable to prospective application. This is completely borne out by Mr. Justice Stewart speaking for the court in Pearce and Simpson where he states at 395 U.S.

> In order to ensure the absence of such a motivation we have concluded . . . There are no issues of fact determination or guilt determination involved in this case . . . so as to help insure the fairness of the sentencing process and to encourage the taking of appeals.

It was established in Linkletter v. Walker, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965) that the Constitution neither prohibits nor requires retrospective effect for decisions expounding new constitutional rules of criminal procedure. A year later in Johnson v. New Jersey, 384 U.S. 719, 720-721, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966) this Honorable Court stressed (1) that the choice between retroactivity and non-retroactivity is to be made in light of the value of the constitutional guarantee involved and (2) that the retroactivity or non-retroactivity of the rule is not automatically determined by the provision of the Constitution on which the decision is based.

Thereafter in *Desist v. United States*, 394 U.S. 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030 (1969), this Court stated that it viewed the retroactivity or non-retroactivity of such decisions as a function of three considerations. These considerations were summarized in *Stovall v. Denno*, 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967 (1967):

> "(a) The purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authority on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

It is noted that these criteria are a refinement of what this Honorable Court said in *Linkletter v. Walker*, 381 U.S. at page 629.

> "Weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation."

The application of new standards of justice retroactively has been generally in those cases where the new rule went to the fairness of the trial — the very integrity of the fact finding process. *Linkletter v. Walker*, at 639. This test of appropriateness was said to call for retroactivity where the error went to the basis of a fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination of guilt or innocence. *Roberts v. Russell*, 392 U.S. 293, 294, 20 L. Ed. 2d 1355, 88 S. Ct. 1921 (1968). The recent cases which have been retroactively applied bear out this statement. *Jackson v. Denno*, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964) (holding retroactive *Massiah v. United States*, 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964) which concerned the necessity of counsel at sentencing). *Roberts v. Russell*, which held retroactive *Bruton v. United States*, 391 U.S. 123, 20

L. Ed. 2d 476, 88 S. Ct. 1620 (1968), which concerned the admission at a joint trial of an extrajudicial confession by one defendant implicating a co-defendant; *Arsenault v. Massachusetts*, 393 U.S. 5, 21 L. Ed. 2d 5, 89 S. Ct. 35 (1968), which held *White v. Maryland*, 373 U.S. 59, 10 L. Ed. 2d 193, 83 S. Ct. 1050 (1957), concerning the right to counsel at a preliminary hearing to apply retroactively; *Berger v. California*, 393 U.S. 314, 21 L. Ed. 2d 809, 89 S. Ct. 540 (1969), holding retroactive *Barber v. Page*, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968), which discussed the use of an absent witness's testimony; and also see *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963); *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956); *Jackson v. Denno*, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964). These cases all concerned the fairness of the trial and were designed to protect the defendant from an unfair adjudication of guilt. No such factors are present under the circumstances of *Pearce* and *Simpson* which are at question herein.

Prospectivity has been given application by this Honorable Court under several different categories, each to fit the parameters of the individual situations. Some such rules are to be applied to all cases which had not become final prior to the announcement of the decision. *Linkletter v. Walker*, *Tehan v. Shott*, 382 U.S. 406, 15 L. Ed. 2d 453, 86 S. Ct. 459, rehearing denied, 383 U.S. 931, 15 L. Ed. 2d 850, 86 S. Ct. 925 (1966). Other new rules are to be applied to cases in which the tainted evidence has not yet been introduced at trial. *Fuller v. Alaska*, 393 U.S. 80, 21 L. Ed. 2d 212, 89 S. Ct. 61 (1968), while others are applied to trials begun after the new rule was announced. *Johnson v. New Jersey*, *Stovall v. Denno*, *DeStefano v. Woods*, 392 U.S. 631, 20 L. Ed. 2d 1308, 88 S. Ct. 2087 (1968); *Jenkins v. Delaware*, 395 U.S. 213, 23 L. Ed. 2d 253, 89 S. Ct. 1611 (1969). And

yet another category of cases is to be applied retroactively to the Appellant and to all cases in the future in which the proscribed conduct has not yet taken place. It is readily seen that each case and the rule which was considered required a different application because of the obvious intrinsic peculiarities present therein.

In *Linkletter v. Walker*, dealing with *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, this Honorable Court said that the exclusionary rule enunciated need not be applied retroactively. The Court there held that the purpose of the rule would not be advanced by retroactivity since the misconduct could not be remedied with a new trial. The reliance by the states upon the rule of *Wolf v. Colorado*, 338 U.S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949), was considered as was the tremendous burden on the administration of justice which would result. Stating what effect retrospective application of *Mapp* would have the Court found:

> To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

When considering whether *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229, reh. den. 381 U.S. 957, 14 L. Ed. 2d 730, 85 S. Ct. 1797 (1965), should be given retroactive application in *Tehan v. Shott*, this Honorable Court held that the rule against adverse comment upon a defendant's failure to testify should not be applied retroactively. It was decided that the rule under *Griffin* enabled a "whole complex of values" and that it fulfilled "no single and distinct purpose" such as the rule of *Mapp v. Ohio* and that the Fifth Amendment privilege against self-incrimination does not relate to protecting the innocent from conviction but rather to preserving the integrity of a judicial system. *Tehan v. Shott*, 382 U.S. at 415.

the ascertainment of truth was not at issue. The Court stressed the heavy reliance on the rule of *Escobedo v. New Jersey*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). The strain which would result if *Escobedo* were given retroactive application was emphasized. The Court reasoned that the rule should be prospectively applied since those reaping the greatest benefit from a rule compelling retroactive application of *Escobedo* would be those under lengthy sentences imposed many years before *Escobedo*.

In considering whether or not the procedural safeguards set forth in *Escobedo v. Illinois*, 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758 (1964), and in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), should be retroactively applied the Court held that those decisions were applicable only to those cases in which trials were begun after the decisions were announced. *Johnson v. New Jersey*. Regarding the new rules, the Court said, 384 U.S. at page 729, that:

> We are thus concerned with a question of prospectivity and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth determining process at trial.

The Honorable Court held that other safeguards existed to protect those who were not covered, stating at 384 U.S. 730 and 733, that:

> Prospective application only to trials begun after the standards were announced is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are now obligatory.

In sum, the Court held that the purposes of the rule should be met in other ways than by retroactive application. It was further held that law enforcement agencies had justi-

and the resulting variance in the sentencing of defendants has been a cause of considerable recent concern in cases such as *Patton v. North Carolina*, 381 F. 2d 636 (4th Cir., 1967); *Marano v. United States*, 374 F. 2d 583 (1st Cir., 1967); and *United States ex rel. Starner v. South Carolina*, 378 F. 2d 808 (3rd Cir., 1967). The related question of whether a person who has overturned a conviction can receive a more severe sentence upon retrial was discussed by this Honorable Court in *Pearce* and *Simpson*. Mr. Justice Stewart, speaking for the Court therein, stated:

> "A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities: *Williams v. New York*, 337 U.S. 241, 245."

Although not overruling *Williams*, the Court held that due process required that where a more severe sentence is imposed upon a defendant after a new trial, the reasons for this judicial action must appear affirmatively. Explicit in this holding is a recognition that there is disparity in the sentencing procedures of the various courts of this nation. The language seems to be clearly cognizant of the fact that different judges view sentencing differently and

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with like background and propensity, may well reach a decision radically different from our own. Who is right?" 42 F.R.D. 224 (1968).

Also:

"Any single-valued approach to sentencing is misdirected. A sentence which is not in some fashion limited in accordance with the particular offense can lead to a system of incomparable brutality. Per contra, a sentence or pattern of sentences which fails to take due account of the gravity of the offense can seriously undermine respect for law." A.B.A. Sentencing Alternatives and Procedures, Project on Minimum Standards on Criminal Justice 1 (1967).

that upon retrial it is not unusual, unfair, or unconstitutional for a greater sentence to be imposed.

Williams v. New York, involved the question of whether or not a judge could consider outside information, such as post-conviction reports, in imposing sentence. The jury there had recommended life imprisonment; but the judge, acting at his discretion, imposed the death penalty, justifying his actions with information which was not available to the jury. The Court in *Williams* stated that:

> "Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. *People v. Johnson*, 252 N.Y. 387, 392, 169 N.E. 619. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."

The *Williams* decision recognizes the wide discretion which the Anglo-American legal system places in the trial judge at the time of sentencing. At page 246 is said:

> "But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law";

and at page 247:

> "[The trial judge's] task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined."

The Federal courts have consistently held that a sentence within the statutory limits is not unlawful and is a

matter for the sound discretion of the trial judge. For example, see *Castle v. United States*, 399 F. 2d 642 (5th Cir., 1968); *United States v. Dawson*, 400 F. 2d 194 (2d Cir., 1968); *Saunders v. South Carolina*, 296 F. Supp. 563 (D.C. S.C. 1969); and *Stevens v. Warden*, 382 F. 2d 429 (4th Cir., 1967).

The Petitioner Moon's sentences were within statutory limits, and his total punishment could have been longer if the trial judge had chosen so. Judge Pugh could have run his sentences consecutively rather than concurrently or suspending them. In any event, the sentences imposed by Judge Pugh, as compared to the sentences imposed against the Petitioner at his first trial, amplify the perplexities that are attendant to the problem of disparity of sentences.

G. *Reasons of Trial Judge for Sentence Are In Accordance With the Due Process Clause.*

However, the best available source from which to obtain information as to the reasons for the increased sentence is the trial court itself. Therefore, following what it considers a directive of this court in *Pearce* and *Simpson* that it is incumbent upon the State to offer reason or justification for the sentence beyond the power to impose it, the Attorney General's Office requested Judge James H. Pugh, Judge of the Circuit Court for Montgomery County, to prepare an affidavit setting forth his reasons for imposing the sentence in question. Said affidavit is self-explanatory, and is herein printed in full at pages 47 to 50 of this Brief and is marked as Respondent's Exhibit A. While it may be arguable that the reasons cited by Judge Pugh do not fall within the framework of the new rule enunciated by *Pearce* and *Simpson* — adopted three years after the sentence was imposed — it is not arguable that his reasons were in conformity with the practice and procedures of sentencing at the time of imposition. Furthermore, there

is no indication of "vindictiveness" against the petitioner for having secured a new trial. It is evident that said sentence did not and does not violate the due process clause of the Fourteenth Amendment.

III.

THE INCREASE OF SENTENCE IMPOSED UPON THE PETITIONER AT THE CONCLUSION OF HIS SECOND TRIAL ON THE SAME OFFENSE FOR WHICH HE WAS FORMERLY CONVICTED DOES NOT CONSTITUTE A VIOLATION OF THE DOUBLE JEOPARDY PROVISION OF THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

On June 23, 1969, this Honorable Court held in *Benton v. Maryland, ante,* page , that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. On the same day, this Honorable Court held in *Pearce* and *Simpson*, that the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction. (The Petitioner in his Brief at page 22 concedes this point.)

However, Mr. Justice Stewart in Part I of the opinion of the Court placed a limitation on the rule enunciated by *Pearce* and *Simpson* in consideration of the question whether, in the imposition of sentence for the same offense after retrial, the Constitution requires that credit must be given for punishment already endured. The opinion went on to state at 395 U.S. :

> "The Court stated the controlling constitutional principle almost 100 years ago, in the landmark case of *Ex parte Lange*, 18 Wall. 163, 168:
>
> > 'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And . . . there has never been any doubt of [this rule's] entire and complete protection of the party

when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.'

* * * * * *

'[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.' *Id.*, at 173.

"We think it is clear that this basic constitutional guarantee is violated when punishment already exacted for an offense is not fully 'credited' in imposing sentence upon a new conviction for the same offense. . . .

"We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense. If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, those years can and must be returned — by subtracting them from whatever new sentence is imposed."

In the case at bar, the Respondent, State of Maryland, has complied with this requirement of the Court. The Petitioner's sentence at the conclusion of his first trial began as of January 7, 1965, the date of sentencing (T. 2). At the conclusion of his second trial, the Petitioner's sentence was calculated as of his date of arrest, June 2, 1964 (T. 5) which was over seven months prior to the starting date of his first sentence. Therefore, the Petitioner received "credit" not only for the time served under his first sentence but also for the time he was incarcerated pending his first trial.

Other than the above, the Petitioner's third argument is answered clearly and emphatically by Part II-A of the

opinion in *North Carolina v. Pearce*, which states at 395 U.S. at

"A.

Long, established constitutional doctrine makes clear that, beyond the requirement already discussed, the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction. At least since 1896, when *United States v. Ball*, 163 U.S. 662, was decided, it has been settled that this constitutional guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside. 'The principle that this provision does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurispurdence.' *United States v. Tateo*, 377 U.S. 463, 465. And at least since 1919, when *Stroud v. United States*, 251 U.S. 15, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction. 'That a defendant's conviction is overturned on collateral rather than direct attack is irrelevant for these purposes, see *Robinson v. United States*, 144 F. 2d 392, 396, 397, aff'd on another ground, 324 U.S. 282.' *United States v. Tateo*, *supra*, at 466.

Although the rationale for this 'well-established part of our constitutional jurisprudence' has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean. As to whatever punishment has actually been suffered under the first conviction, that premise is, of course, an unmitigated fiction, as we have recognized in Part I of this opinion. But, so far as the conviction itself goes, and that part of the sentence that has not yet been served, it is no more than a simple statement of

fact to say that the slate has been wiped clean. The conviction *has* been set aside, and the unexpired portion of the original sentence will never be served. A new trial may result in an acquittal. But if it does result in a conviction, we cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question. To hold to the contrary would be to cast doubt upon the whole validity of the basic principle enunciated in *United States v. Ball, supra*, and upon the unbroken line of decisions that have followed that principle for almost 75 years. We think those decisions are entirely sound; and we decline to depart from the concept they reflect.

CONCLUSION

For the foregoing reasons, this Honorable Court's decision in *Pearce* and *Simpson* should not be retroactive, and the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,

EDWARD F. BORGERDING,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,
For Respondent.

RESPONDENT'S EXHIBIT "A"

In The Circuit Court for Montgomery County, Md.

Nos. 7639 and 7640

State of Maryland

vs.

Dennis Mullene Moon

At the request of the Attorney General of Maryland, made to me on the 30th day of September, 1969, I do hereby make the following statement:

On June 6th and 7th, 1966, I presided over the jury trial of Dennis Mullene Moon who was convicted under two indictments, No. 7639 and No. 7640, with the crimes of assault with intent to kill and murder (No. 7639 Criminals) and robbery with a deadly weapon and grand larceny (No. 7640 Criminals). At the request of the defendant's attorney, sentence was imposed after the return of the verdict, no request for a presentence investigation was made because such was not desired by defendant's attorney. At the sentencing I was informed that another Judge of this Court had sentenced the defendant to twelve years in the penal institution after his conviction of the crime of robbery with a deadly weapon. There was no trial under Criminals No. 7639 charging assault with intent to kill and murder, at the first trial. I was also aware of the fact that the defendant was given a retrial as a result of the decision of the Maryland Court of Appeals in the case of Schowgurow vs. State, 240 Md. 121. I sentenced the defendant

3. The defendant was tried and convicted of another offense at his trial, the crime of assault with intent to kill and murder, which sentence of ten years I suspended on condition that he remain on good behavior when he is released under the sentence of twenty years.

4. The defendant had previous convictions of house breaking and larceny for which he was sentenced to one year in Ft. Leavenworth, Kansas, in 1939, a conviction under the Dyer Act in Carson City, Nevada, in 1961 for which he was sentenced to three years, a conviction on April 13, 1961 under Title 18, Sec. 2312 in Las Vegas, Nevada, for which he was given three (3) years.

5. The defendant took the stand and under oath denied that he had struck the defendant. When his lawyer called to the defendant's attention that he took the stand in the previous trial and admitted hitting the victim, the defendant said he did not remember testifying that he hit the victim at the first trial, which I did not believe, and I was convinced that he had perjured himself at this sentencing, which I considered as identifiable misconduct on his part occurring after the time of the original sentence.

6. That on June 8, 1966, I refused to sign an order to have the defendant transferred from the Maryland Penitentiary to the Patuxent Institution for his evaluation as to whether or not he was a defective delinquent under Article 31B, Section 5 of the Code of Laws of Maryland stating that: The defendant has been sentenced to twenty years in the Penitentiary plus two ten year sentences which were suspended and the Court is of the opinion that the sentence of twenty years plus the two ten year suspended sentences is adequate and therefore no proceedings should be filed under the defective delinquency statute.

7. I had not read the transcript of the first trial and did not preside at the first trial, therefore did not know what facts and circumstances the first Trial Judge took into consideration in sentencing the defendant to twelve years.

Respectfully submitted,

JAMES H. PUGH,
Judge of the Circuit Court
for Montgomery County,
Maryland.

Subscribed and sworn to before me this 1st day of October, A.D., 1969.

BETTY RUTH BELCHER,
Notary Public, Maryland.

(Seal)